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In the Supreme Court of the United States

FEBRUARY TERM, 1924

Fred W. Gooding, Novinger & Darrah Sheep
Company, Ltd., T. B. Jones, et al.,
Cross Appellants

vs.

The Idaho Irrigation Company, Ltd., a Cor-
poration, The Equitable Trust Company
of New York, a corporation, and Lyman
Rhoades, as Trustees, et al.,
Cross Appellees

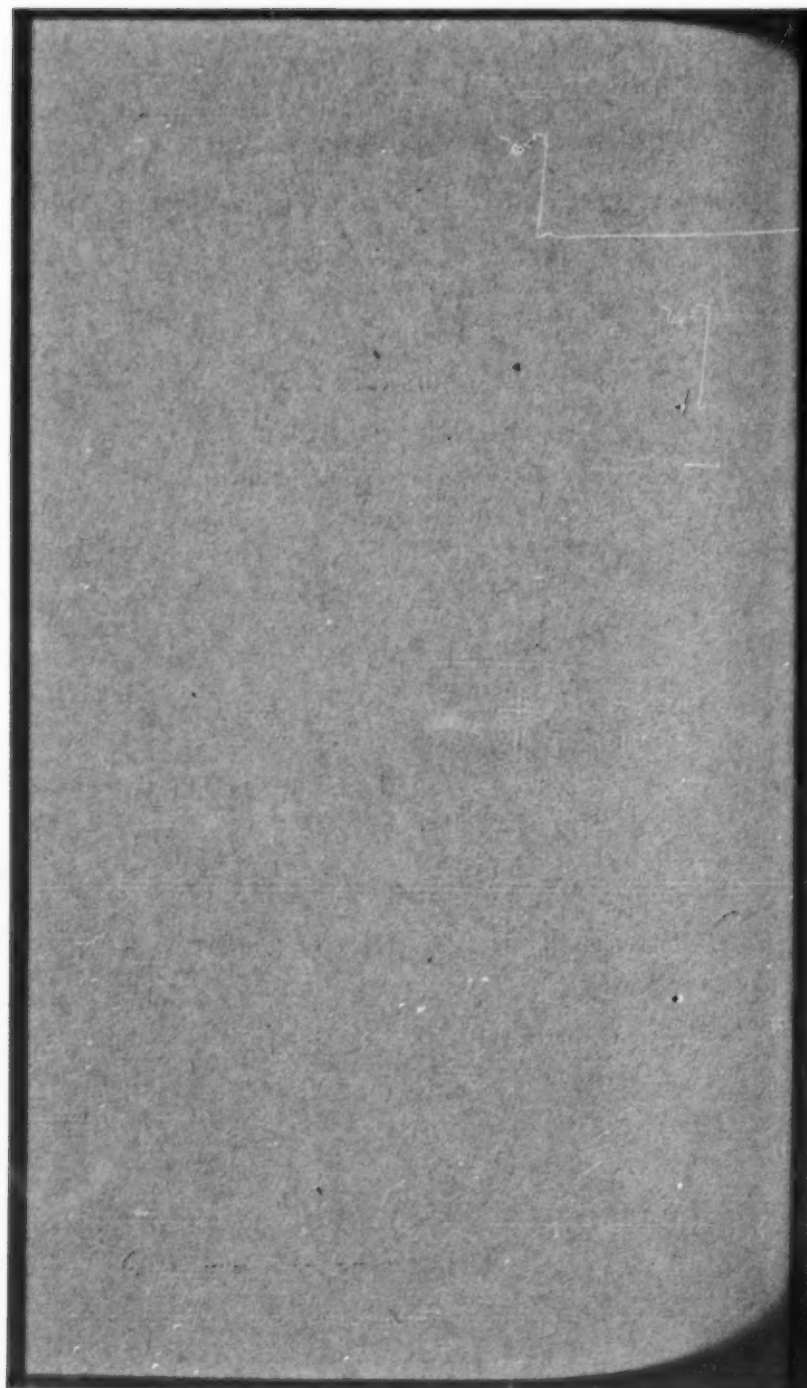
No. 336

REPLY BRIEF OF CROSS APPELLANTS

(Upon Cross Appeal from the United States Circuit
Court of Appeals, for the Ninth Circuit)

W. G. BISSELL, and
BRANCH BIRD,
Gooding, Idaho, and

KARL PAINE,
Boise, Idaho,
Solicitors for Cross Appellants.



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CARD 12



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PRELIMINARY STATEMENT

In answer to the brief of cross appellees herein the two trustee appellants, The Equitable Trust Company of New York, a corporation, and Lyman Rhoades, have filed their separate brief. Such brief will be referred to as the "Trustees' brief." It is significant to note that the Idaho Irrigation Company and M. R. Kays, trustee, do not join in this brief. The natural conclusion to be adduced from such fact is that the Idaho Irrigation Company and M. R. Kays, trustee, confess that the cross appeal is well taken, and that the action of the Circuit

Court of Appeals complained of by said cross appeal is erroneous and should be reversed. The record shows that when the answer was filed in 1919 M. R. Kays, as trustee, held in his name 6,822.75 shares, which were the assets of the Idaho Irrigation Company (118). This figure was altered to a certain extent prior to the trial of the cause in 1920, at which latter time defendants' exhibit 11 was compiled. Because of this state of affairs we urge that this court should proceed upon the theory that as to that portion of the trustee shares which were in the name of said M. R. Kays, trustee, the action of the Circuit Court in permitting 5,322.26 additional shares to be sold is admittedly erroneous.

In this brief all figures in parentheses refer to the respective page numbers of the transcript of the record.

STATEMENT OF THE CASE

We desire to note one exception to the statement of facts contained at page three of the brief of said trustees. There certain figures are given relating to shares, which said trustees claim were held by themselves at the time of the commencement of the suit or at the time of the trial. These figures purport to have been taken from defendants' exhibit 11. Referring to this exhibit we find the following items, among others:

"Held by company at time suit commenced	8,467.07
Acquired by company since suit commenced	4,255.57"

The trustees again refer to this matter on page eight of this brief. This exhibit, which was submitted on behalf of all the defendants, including the trustees, does not show that the trustees held any shares at that time, but it does show that the "company" held 12,722.64 shares.

BRIEF OF THE ARGUMENT

Where the majority of the outstanding stock of a Carey Act construction company is held and dominated by a bondholders committee, which committee elects the officers and outlines the policies of said construction company, assets of said construction company standing in the names of trustees for said committee will be considered, in a court of equity, as being the property of said construction company. Argued and cases cited at pages 3 to 6 hereof.

Where the assignee of a mortgagee forecloses the mortgage and buys the property in at sheriff's sale, such assignee- purchaser only acquires thereby such right and interest in and to the mortgaged premises as the original mortgagee would have acquired by a similiar purchase. Argued and authorities cited at pages 6 to 11 hereof.

ARGUMENT

Points One, Two and Three

Under the above numbered points the trustees discuss the standing of the 12,722.64 shares, shown by defendants' exhibit 11 to have been held by the company at the time suit was commenced or acquired by it after institution of the suit and prior to the trial of the cause.

As we understand their position, the trustees contend that these shares were acquired through foreclosure proceedings and bought in in the name of the trustees, and constitute the separate and independent property of the trustees; that the ownership thereof by the trustees is on a parity with the ownership of the settlers on the project, and therefore that it was not proper for the District Court to have enjoined the resale thereof. The cross appellees contend that in equity said foreclosed

12,722.64 shares, though they may have been purchased at sheriffs' sales by the trustees, constituted the assets and property of the construction company and as such were subject to the injunction issued by the District Court just as completely as were all the other originally authorized and unissued shares of stock under said project.

As to who owned said 12,722.64 shares and in whose name the same stood at the time of the institution of the suit and at the time of the trial the record shows the following:

(1) The defendants, including the trustees, admit that the said shares are the assets of the Idaho Irrigation Company, and are held for the benefit of the bondholders of said company (118);

(2) Mr. Kays, vice-president and general manager of the Idaho Irrigation Company, testified that he believed the Idaho Irrigation Company to be the beneficial owner thereof (434);

(3) Defendants' exhibit 11 shows the same to have been "held by the company";

(4) It was stipulated by counsel for the trustees and the other defendants that the Idaho Irrigation Company was the beneficial owner of said 12,722.64 shares, and owned and controlled the same (569), (except 3,143.61 shares which had been sold to interveners upon certain stated conditions (568).

If the view we take of the record and the facts thereby disclosed is correct it is not necessary to determine whether these shares were carried in the names of the trustees or in the name of the construction company. As a matter of practice we venture the off-record conclusion that some of these shares were carried in the names of the trustees and some in the name of the company. It

will be remembered that the trustees were parties defendants to the action, as well as the construction company. The District Court enjoined the sale of any water that was held by the trustees upon the equitable theory that the Idaho Irrigation Company was in reality the owner thereof (145). This matter has not been dealt upon extensively in prior briefs for the reason that it has been generally conceded, until this independent brief was filed by the trustees, that the rights and interests of the trustees were one and the same as the rights and interests of the construction company. We believe that the record shows such to be the fact.

This matter was necessarily difficult of proof, but the deposition of witness H. L. Stewart, contained in the record as plaintiffs' exhibit 28 (437 et seq), when considered in connection with the exhibits to said deposition and the record as a whole, approximates conclusive proof upon this matter. From an examination of this deposition and the exhibits attached thereto this court will readily determine that the Idaho Irrigation Company, while in name a corporate entity, was in fact a mere mechanical contrivance for administering the affairs of its bondholders and mortgagee. Mr. Stewart testifies that such plans were put into execution and the election of the directors of the company thereafter was had in accordance therewith (440). The trustees are trustees for these bondholders and mortgagees. The bondholders select and elect the officers of the company and consequently were empowered to dominate and control said Idaho Irrigation Company and outline all its policies and activities. In other words, both the defendant construction company (Idaho Irrigation Company) and the defendants' trustees were subservient to and owned and controlled by the bondholders and

their authorized committees and organizations. And whether said shares were in the name of one of the trustees, the bondholders, or the construction company, they nevertheless constituted the assets of the construction company and in a court of equity will be considered as the property of such company, and therefore subject to any restraints available against said company. This court is sitting as a court of equity and it will employ its equitable powers to penetrate such a thin veil of technical, legal ownership as the trustees seek to assert in an effort to avoid the injunction issued by the District Court. In equity and good conscience, and for the purposes of the present action, the ownership of the trustees and the ownership of the company is one and the same, as all the property in question is admittedly beneficially owned by the company (434 and 569).

Admitting that we are wrong in the foregoing conclusion (which we do not do except for the sake of the argument), then it is certain that the trustees acquired their present interest in and to the water shares in question through the mortgaging or assignment of water contracts to them by the construction company, and the subsequent foreclosure thereof. What interest did the trustees obtain under such a proceeding? Clearly, "the title conveyed by such completed foreclosure sale is all the right title and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him." 19 R. C. L. 625. In other words, when the trustees purchased said water at foreclosure sales they only acquired thereby such interest in and to said contracts and water as their mortgagor, the Idaho Irrigation Company, may have held in and to said premises at the time of the execution of the mortgage

or assignment, together with such interest as it may have acquired thereafter; and by such purchase the trustees did not obtain any greater rights than the mortgagor and assignor held. Such purchasers acquired exactly the same rights that the Idaho Irrigation Company would have acquired had it retained the contract and prosecuted the action and bid the property in at sale in its own name. 5 C. J. 962. If the Idaho Irrigation Company had foreclosed one of these contracts the contract thereby would have been terminated and the water right represented thereby would have been cancelled and the water represented by said contract would then be under the exclusive jurisdiction and control of the construction company, and such water would then automatically and as a matter of law become subject to the statutory and contractual inhibitions prohibiting a Carey Act construction company from selling more water than it in fact has. The provisions of the contracts and statutes forbidding such excessive sales are pointed out at pages 28 to 33, inclusive, of the brief of cross appellants herein. In other words, it is our position that when the trustees bought these water contracts at sheriffs' sales, the water represented by such contracts was in equity and in truth returned to the original mass and could not be again sold to a settler if in fact the construction company and its equitable owners, the bondholders and trustees, had already sold all of their appropriated water, including such foreclosed shares.

We believe that every question raised in the brief of the trustees has been answered by the supreme court of Idaho in the case of Childs vs. Neitzel, 141 Pac. 77. In that case the project was not in reality organized under the Carey Act, but as the court stated at page 85:

"The contracts entered into with the purchasers of water rights are similar in many respects to those entered into by the purchasers of water rights under the Carey Act."

That case was originally filed for the purpose of ousting certain corporate officers. However, by amended pleadings and interventions by the water contract holders, the issues of the case were finally brought to a point which renders the case authoritative upon the issues raised by the trustees' brief. It will be noticed that the contracts held by the settlers in that case are almost identical with those in the instant case. Alleging that the construction company had not completed the system, the contract holders asked the court to appoint a receiver and take over the active management and control of the project and apply the payments becoming due upon the water contracts to the completion of the system. One, H. R. Neitzel, who held an assignment of the water contracts from the construction company to secure loans and also held a mortgage executed by the corporation, objected upon the ground that he held these contracts by assignment and had a mortgage upon the property of the construction company and that the court could not deprive him of his security by providing that the payments due upon contracts which he held should go to the completion of the system rather than to the repayment of his loan. Laying aside technical matters, that is really the relief that the trustees desire in the present case, and we believe that the Childs-Neitzel decision is conclusive of the position of the trustess in the instant case. In part the court said:

"Said contracts show their exact terms on their face, and include mutual covenants, and since H. R. Neitzel received said contracts by assignment, he

had notice of all the covenants contained therein. Those contracts were made by the purchasers of water rights with the Murphy Company, and that company could not have enforced the collection of the deferred payments and interest thereon without complying with the terms thereof as to the construction of said system and the delivery of water, and neither the mortgagee nor the assignee could acquire any greater rights in that regard than the Murphy Company itself had under said water contracts. H. R. Neitzel, by loaning said money to the Murphy Company and taking as security for the payment of the same a mortgage on said company's interest in said system and water rights and an assignment of said water right contracts, did not become an insurer for the Murphy Company to the water right claimants that said system would be completed and the water furnished, but he stands in the shoes of the Murphy Company so far as the collection of the deferred payments are concerned, and cannot enforce their collection until said system is completed and the water furnished in accordance with the terms of said water right contracts.

"Construction companies of this kind will not be permitted to do indirectly what they are prohibited from doing directly. They will not be permitted to make contracts with third parties in regard to the construction or completion of an irrigation system whereby the landowners or purchasers of water rights can be deprived of the rights acquired under their water right contracts. For instance, if a company, such as the Murphy Company, fails to complete its system and furnish the water as provided in the water right contracts, or if such company should sublet the construction of its system and fail and neglect to pay such subcontractor, the subcontractor could not acquire greater rights as against the water right purchasers than the irrigation company itself had under its contract with

the purchasers of water rights under such system of their rights, or acquire a right by foreclosure of a lien or mortgage for such construction work as would deprive the water right purchasers of their rights under their contracts.

"In loaning money to such a corporation, the one loaning must rely primarily on the borrower to carry out the contracts with the water right purchasers. The mere consent of the water right users to the assignment of said contracts was not a waiver of their right to have the system completed; but the assignment was given subject to the obligation of the Murphy Company, or its assigns, to carry out and complete said irrigation system and deliver the water."

As to the 3,143.61 shares sold to the interveners after the filing of the suit and the recording of the *lis pendens*, which the trustees state at page 17 of their brief were sold to bona fide settlers, we refer this Court to the opinion of the Circuit Court (681-2). It is there shown that said shares were purchased with both actual and constructive notice of the pendency of the action. The constructive notice was afforded by the statutory *lis pendens*, and actual notice was imparted by

" the understanding and agreement that in the event of an adverse decision to said defendants in this action that said trustees would make compensation or a refund to the purchasers of said shares of stock." (568).

Under this state of facts it cannot be fairly said that these purchasers acted in good faith. On the other hand, they purchased with full knowledge and are doubtless fully protected by their agreement with the trustees.

In concluding this part of our argument we wish to impress upon the court the full extent of the decision

in the Childs-Neitzel case. In a few words, it can be stated that in that case the court, through a receivership, took the security of the mortgagee and assignee of the construction company and applied it in such manner as best to afford to the settlers the rights and privileges they were entitled to under the terms of their water contracts. This was done upon the theory that the mortgagee and assignee took his security with full knowledge of the obligations contained in the contracts held by the settlers and of the duty devolving upon the assignor and mortgagor to complete the system and deliver the water. Applying that reasoning to the instant case, we find that the trustees took their security with full knowledge that the construction company was obligated to furnish the contract purchasers with a specific amount of water, and with the further knowledge that the laws of the State of Idaho and the contracts between the State of Idaho and the construction company prohibited said construction company from selling more contracts than its water appropriation could supply. The rights of the trustees are subject to these statutory and contractual rights and liabilities existing between the construction company and settlers, and the trustees are not entitled to realize anything upon their security until these rights of the settlers have been satisfied reasonably and equitably. Therefore, we urge that the District Court was correct in exerting its equitable powers and restraining the sale of the shares held by the trustees, whether such shares were held at the time of the institution of the suit or were acquired prior to the trial date.

POINT FOUR

The trustees next contend that the District Court's decree is erroneous because it in effect grants negative

specific performance, yet it has not been alleged or proven that the plaintiffs have complied with the terms of their contracts. The effect of the District Court's decree was not to grant specific performance, negative or positive. The contracts provided that the settlers should receive five and one-half acre feet of water, (674), whereas the District Court's decree awarded them only two and three-fourths acre feet (149). This is far from specific performance. The fact is, that the settlers did not ask specific performance because they realized that it was not within the power of the construction company to fully perform, and the record shows that the construction company is powerless to specifically perform. Under these conditions it was not necessary to allege or prove that the plaintiffs had fully performed their contracts.

However, it is alleged in the complaint (16), and admitted in the answer of the company and the trustees (100), that plaintiffs own the land and hold shares of stock in the company. Unquestionably this allegation and admission show a sufficient performance on the part of the settlers to enable them to maintain the present action, for if they had not substantially performed their contract obligations it must be assumed that they could not have held their contracts. At any rate they have effected such a performance as would render it inequitable not to grant them the relief prayer for.

"In courts of law a more exacting rule may prevail. But in a court of equity, where the legal effect of a bill for specific performance is such that the complainant submits to do everything which may be required of him, it is not essential that a literal and precise tender of performance shall precede the application for the equitable remedy of

specific performance. *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447, 32 L. Ed. 878; *Cheney v. Libby*, 134 U. S. 68, 10 Sup. Ct. 498, 33 L. Ed. 818; *Willard v. Tayloe*, 8 Wall. 557, 19 L. Ed. 501; *Bradford v. Foster*, 87 Tenn. 5, 9 S. W. 195;"

Kentucky Dist. & Whse. Co. v. Blanton, 149 Fed. 31-40.

"If a court of equity is without authority to specifically enforce the contracts in question, the water users would have no remedy whatever by which they could protect their rights. There would exist a wrong without a remedy, and that is contrary to the well-recognized maxim that equity will not suffer wrong to be without a remedy. It would be a grievous wrong to the owners of contracts for water rights to be compelled to pay for such rights and have no remedy whatever to compel the contracting party to furnish them water."

Childs v. Neitzel, 141 Pac. (Ida.) 77-86.

POINT FIVE

The trustees contend also that the admission in the answer, to the effect that water contracts should not be sold beyond the available appropriated supply of water (114) has no bearing upon the points discussed in their briefs. We do not believe that this court will agree with the trustees upon this point, because that admission was made by counsel who represented the trustees and the construction company alike. As pointed out and admitted, these shares constituted the assets of the construction company (118), and said shares were beneficially owned and controlled by said company (569). Under these conditions, tho technically speaking said shares may have stood on the records in the names of the trustees, a court of equity having jurisdiction

over all the parties and the res, and being cognizant of such equitable ownership by the construction company, will undoubtedly give credence to such admission and be governed accordingly . As this court has said:

“Whenever the legal title to property is obtained through means or under circumstances ‘which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never, perhaps, have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a high right and takes the property relieved from the trust.” Pomeroy, Eq. Jur. Sec. 1053.”

Moore v. Crawford, 130 U. S. 122, 32 Law. Ed. 878-880.

POINT SIX

The trustees claim that the Circuit Court did not err in its order of October 4, 1922 (689-692), whereby it ordered that the District Court's decree be reversed to the extent of permitting 5,322.26 additional shares to be sold. They state that the Circuit Court did not consider that these shares were included in the injunction of the District Court. The decree of the District Court (153) upon this point is so clear and positive that we are unable to understand how any court could be in doubt as to what shares were included. Under this state of the record the Circuit Court was not justified in excluding said 5,522.26 shares without first granting a rehearing and permitting all interested parties to be heard. Its action in this respect constituted reversible

error. At any rate, this action should be reviewed in this court and the settlers afforded any deserved relief.

In view of the foregoing facts and authorities, and in view of the whole record, it is respectfully submitted that the decree of the Circuit Court of Appeals should be reversed and the decree of the District Court ordered affirmed.

Respectfully submitted,

W. G. BISSELL,

BRANCH BIRD,

KARL PAINE,

Solicitors for Cross Appellees.



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CARD 13

IDAHO IRRIGATION COMPANY, LTD., ET AL. v.
GOODING ET AL.

GOODING ET AL. v. IDAHO IRRIGATION COM-
PANY, LTD., ET AL.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE
NINTH CIRCUIT.

Nos. 324 and 336. Argued April 11, 14, 1924.—Decided June 9, 1924.

1. A contract by a water company in Idaho granting a water right of so much water per acre is to be read with and controlled by statutes of the State limiting allowances to the amount used for beneficial purposes, and forbidding a water-right owner to use more than good husbandry requires. P. 523.

IDAHO IRRIG. CO. v. GOODING.

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Statement of the Case.

2. A State, through contract with an irrigation company, undertook to reclaim public lands under the Carey Act, and applied for and obtained from the Secretary of the Interior a patent for an area fixed by him, upon evidence that an ample supply of water was actually furnished to reclaim it as contemplated by the act. *Held*, that the action of the Secretary, regarded as an adjudication that the supply was adequate for all the land included, did not bind settlers on the project who purchased water-rights from the company and who sought to enjoin it from violating their contracts by selling more rights in excess of the water actually available. P. 523.
3. Owners of water-right shares in a Carey Act project in Idaho, *held* bound to share water proportionately with others who were sold like shares by the water company in excess of the water supply, but entitled to enjoin the company from disposing of additional rights. P. 524.
4. An Idaho water company which sold water rights on a Carey Act project in excess of the water supply, *held* properly to be enjoined from reselling other shares which it had sold and reacquired through foreclosure, even though appurtenant, under Comp. Stats., Idaho, § 3018, to land owned by itself, since, under the Carey Act and the Idaho law, water rights are distinct property not inseparably attached to the land for the irrigation of which they were acquired. P. 525.

285 Fed. 453, affirmed in part and reversed in part.

APPEAL and cross appeal from a decree of the Circuit Court of Appeals affirming, with modifications, a decree of injunction entered by the District Court in a suit brought by owners of water rights (with whom the State of Idaho joined, by intervention,) to prevent the above-named Irrigation Company, and other defendants, from disposing of further water rights in an irrigation "project", in violation of the plaintiffs' contracts. The suit came into the District Court by removal from a court of Idaho.

Mr. Gordon M. Buck, with whom *Mr. Raymond J. Scully* was on the briefs, for the Idaho Irrigation Company, Ltd.

Mr. Harrison Tweed for the Equitable Trust Company of New York et al., Trustees.

Mr. W. G. Bissell, with whom *Mr. Branch Bird* and *Mr. Karl Paine* were on the briefs, for Gooding et al.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These are separate appeals by the respective parties from the same decree, 285 Fed. 453, in part affirming and in part reversing the Federal District Court for Idaho.

The Idaho Irrigation Company, Limited, is a corporation organized as a construction company for the purpose of reclaiming lands under the Carey Act, c. 301, § 4, 28 Stat. 422. The other appellants in No. 324 (appellees in No. 336) are trustees for bondholders of the Irrigation Company and certain intervening individual owners of land, who had purchased water rights after this suit was brought and a *lis pendens* filed. Appellees (appellants in No. 336) are individual owners of water rights, purchased from the Irrigation Company under the Carey Act, and the State of Idaho, which intervened as a party plaintiff.

The water rights are represented by shares of stock in the Big Wood River Reservoir & Canal Company, organized as an operating company by the Irrigation Company in pursuance of contracts with the State of Idaho.

The suit, brought in a state court and removed to the Federal District Court, was to enjoin the Irrigation Company and the trustees from selling, disposing of or transferring upon the books of the company any shares of the Reservoir and Canal Company held as assets of the Irrigation Company or as trustees for the benefit of bondholders; and to enjoin the Irrigation Company from making further contracts for the sale of water rights, or selling, disposing of or transferring any shares of the Reser-

voir & Canal Company which the Irrigation Company owned or controlled.

By the Carey Act the United States binds itself to donate, grant and patent to a State, complying with stated conditions, desert lands, which the State may cause to be irrigated, reclaimed and occupied. The State is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts to cause the lands to be reclaimed, and to induce their settlement and cultivation. Upon satisfactory proof the Secretary of the Interior is directed to issue patents to the State or its assigns. In pursuance of the Carey Act and of its own statutes to carry that act into effect, c. 136, Idaho Comp. Stats., 1919, p. 848, the State of Idaho entered into contracts with the Irrigation Company for the reclamation of approximately 167,000 acres of land; and the Company entered into contracts with appellees and other settlers to furnish water for lands to be acquired by them in the project, to be represented by shares of stock in the Reservoir & Canal Company.

By these contracts, made on January 2, 1909, and prior dates, the Irrigation Company, understood to be the owner of the right to divert 6,000 cubic feet per second of time of water, agreed that it would furnish and deliver to the owners of such shares all of the appropriated waters to the extent of one-eightieth of a cubic foot per second of time per acre; and that water rights or shares should not be sold beyond the carrying capacity of the canal system or in excess of the waters appropriated. Shares of stock of the Reservoir & Canal Company were to be issued in the proportion of one share for each one-eightieth of a cubic foot per second of time. It was further agreed that the irrigation works should be completed within five years from the date of the contracts, at which time the obligation to furnish the full one-

eightieth of a cubic foot per second of time per acre should be in force and effect.

Upon application of the State of Idaho and evidence to the effect that an ample supply of water was actually furnished and in sufficient quantity to reclaim the lands as contemplated by the Carey Act, the Secretary of the Interior fixed the area of the project at 117,677.24 acres and caused a patent of the United States therefor to be issued and delivered to the State.

The injunction was sought upon the ground that the water, appropriated and available, was wholly insufficient to irrigate the entire area and was no more than sufficient to irrigate 40,939 acres, and that water rights had been sold for lands largely in excess of this area. A *lis pendens* was filed for record in the various counties where the property was situated, which had the effect of imparting constructive notice to all of the pendency of the suit. Comp. Stats. 1919, § 6674. The answer of the Irrigation Company alleges that water right shares had been sold for more than 87,000 acres; that the supply of water appropriated and available was sufficient for the lands represented by these shares and over 25,000 acres in addition. The answer avers as a further defense that the action of the State and of the Secretary of the Interior and the issuance of the patent thereon, constituted a determination by the State of Idaho and the Secretary of the Interior that the water supply and the capacity of the irrigation works were sufficient and that this was binding and conclusive in the case.

It was stipulated at the trial that the total outstanding shares of the Reservoir & Canal Company were 88,835.71. Of these 12,722.64 shares, originally sold to individuals, had been purchased by the trustees at foreclosure sale, out of which 3,143.61 shares were sold to the intervenors after the commencement of the suit and the filing of the *lis pendens*.

The District Court took evidence in open court under Equity Rule 46 and delivered an opinion in favor of appellees, upon which a decree was entered. It determined from the evidence that the reasonable duty of water was $2\frac{3}{4}$ acre feet per acre for the entire area, without deduction for roads or other non-irrigable tracts; and, without attempting to determine the exact quantity of available water, found that the supply was and would continue to be insufficient to meet the demands of the outstanding contracts, exclusive of those which the Company had acquired through foreclosure proceedings. These findings have support in the evidence and the conclusion is justified that the available water will fall short of supplying as much as 50,000 acres of land. The allowance of $2\frac{3}{4}$ acre feet per acre is much less than the quantity stipulated in the contract, but the reduction by the court was properly made under the Idaho statute, which requires that the amount of water allowed shall never be in excess of the amount used for beneficial purposes, Comp. Stats., 1919, § 7033; and the statute which forbids the use by any water right owner of more water than good husbandry requires. § 5640. These provisions are to be read into the contracts. *State v. Twin Falls, etc., Co.*, 30 Idaho, 41, 77. By statute it was made unlawful for the Irrigation Company to contract to sell more water than it had. § 5636. *State v. Twin Falls, etc., Co.*, *supra*, 65; *Gerber v. Nampa, etc., Irrigation District*, 16 Idaho, 1, 17.

We cannot accept the contention of appellants that the application of the State and the issuance thereon of a patent to the lands by the Secretary of the Interior constituted a determination binding on the individual water right owners that an ample supply of water was available for the entire 117,677.24 acres. Whatever may be the effect of this action as between the United States and the State of Idaho, it is perfectly clear that it can have no

effect upon the rights of the individual land and water owners. Their rights are to be measured by the contracts; and by these contracts the Irrigation Company bound itself to furnish one-eightieth of a cubic foot per second of time per acre. We fully agree with the District Court that the individual appellees, not being parties to these proceedings, are not bound by them, and in saying: "They hold contracts imposing upon them heavy obligations, and in turn conferring upon them valuable rights. It would be shocking to hold that these rights could be taken away or substantially impaired by a finding of fact or conclusion of law (we are not advised which) made by an administrative officer in an ex parte proceeding in which they did not have an opportunity to be heard." See also *Twin Falls Oakley Land & Water Co. v. Martens*, 271 Fed. 428, 433.

As among the individual owners the water rights conveyed by the Irrigation Company are vested and under the contracts must be shared proportionately; but the Irrigation Company is without right to continue to contract to sell and deliver water from a supply that has already been exhausted, thereby compelling these owners to still further diminish their proportionate rights. As said by the Supreme Court of Idaho in *Sanderson v. Salmon River Canal Co.*, 34 Idaho, 303, 310: "It is one thing to prevent any more rights vesting, in order to avoid a hardship to those whose rights have already vested, and it is another thing to wipe out rights which have already vested through the issuance of contracts and the use of the water." *State v. Twin Falls Land & Water Co.*, 37 Idaho, 73, 85; *Boley v. Twin Falls Canal Co.*, 37 Idaho, 318, 331-332; *Caldwell v. Twin Falls, etc. Co.*, 225 Fed. 584, 592-595.

We think the District Court was also right in including in the injunction the 12,722.64 shares of stock purchased by the trustees at foreclosure sale. These shares were

the property of the Irrigation Company, and, representing an excess of available water supply, should be extinguished and their resale enjoined. They are subject to the same principle that was applied to the issuance and sale of additional original shares in excess of such supply. The conclusion of the District Court was based upon the theory that the ownership and control of these shares were in the Irrigation Company and this is supported by the evidence. Indeed, it was so stipulated between counsel at the trial. See *Childs v. Neitzel*, 26 Idaho, 116, 127, 129-131.

The Court of Appeals, however, held that the decree of the District Court in this respect was erroneous to the extent of 5,322.26 shares, which were appurtenant to the lands owned by the Irrigation Company and its trustees when the suit was commenced and *lis pendens* filed; but we are unable to see that these shares occupy any different status from the others. The stipulation of ownership and control included all. If the injunction was bad as to the 5,322.26 shares, it was bad as to all. The Irrigation Company, having oversold the available water supply, exclusive of the shares purchased at foreclosure sale, cannot be permitted to sell additional shares, whether still unissued, or issued and sold but re-acquired, and whether acquired before the suit and *lis pendens* or afterwards. It may be conceded that the water rights represented by these shares were appurtenant to the lands for the irrigation of which they had been acquired, Comp. Stats. Idaho, § 3018; but they were not, under the Carey Act and the laws of Idaho, inseparably appurtenant to the lands, but constituted distinct and separable property rights. *Bennett v. Twin Falls, etc. Co.*, 27 Idaho, 643, 653. To permit the use and enjoyment of these water rights by the Irrigation Company, with the consequent further reduction of individual rights purchased from the Company, would be to ignore the distinction between the wrongdoer

and the innocent, and is not to be suffered by a court of equity.

In so far as the decree of the Court of Appeals agrees with that of the District Court it is affirmed; but in respect of the matter last discussed it is reversed and the decree of the District Court affirmed in all particulars.

No. 324, Affirmed.

No. 336, Reversed.

END

OF

CASE

OPINION